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Insurance--Waiver of Condition after Loss--Authority of Fire Insurance Adjuster

defense, provided the application contains provisions expressly limiting the power of the agent to bind his company by his acts and representations.[6] Such a limitation has been ignored[7] or rejected[8] by the state courts as running counter to the principle that one may not exempt himself by contract from the fraud of his agent.[9]

There is the faint suggestion in the principal case that its outcome might have accorded with the federal rule, had there been restrictive covenants in the application limiting the agent's authority as auditor or recorder of answers to questions.[10] Under prior West Virginia decisions,[11] however, it would seem that the result here reached is desirable even in the presence of such limitations on the agent's authority. The fact that applicants for insurance regard the signing of the application as a matter of form and rely upon the superior knowledge and good faith of the agent justifies the placing of the risk of the agent's misconduct upon the company.

INSURANCE—WAIVER OF CONDITION AFTER LOSS—AUTHORITY OF FIRE INSURANCE ADJUSTER. — Plaintiff seeks to collect an insurance policy for loss occasioned by fire resulting from use of a gasoline flatiron. A clause rendered policy void if gasoline was kept or used on the premises. Special agent and adjuster, though the policy expressly withheld power to waive written stipulation of policy, orally promised to pay the loss. *Held,* that power to waive orally cannot be inferred from agent's title alone where expressly withheld, and insured is bound by her contract and has

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[6] New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837 (1886); W. S. Life Ins. Co. v. Smith, 92 Fed. 503 (C. C. A. 6th, 1899); Hubbard v. Mutual Reserve Fund Life Ass'n, 80 Fed. 681 (C. C. R. I., 1891); Maryland Casualty v. Campbell, 255 Fed. 437 (C. C. A. 5th, 1919).

[7] For a full collection of cases and note dealing with the application of the federal rule, see (1906) 4 L. R. A. (N. S.) 607. Also see (1915) 53 L. R. A. (N. S.) 273.

[8] See *supra* n. 7. Also see Foster v. Pioneer Mutual Ins. Ass'n, 37 Wash. 288, 79 Pac. 798 (1905); Leisen v. St. Paul Fire & Marine Ins. Co., 20 N. D. 316, 127 N. W. 837 (1910).

[9] VANCE, INSURANCE (2d ed. 1930) 445.

[10] The West Virginia court states the rule as being applicable in the absence of restrictive covenants upon the agent's authority.

[11] Earlier West Virginia cases hold the company bound by the knowledge of the agent. See McCall v. Phoenix Mutual Ins. Co.; Medley v. German Alliance Ins. Co., both *supra* n. 1.

That the company may not escape liability for the acts and representations of their agents by provisions in the policy, see Deitz v. Insurance Co., 31 W. Va. 851, 8 S. E. 616 (1888).

no right of action against insurer for a loss caused by the risk expressly excepted. Judgment for plaintiff reversed and remanded. *Bailey v. Mutual Fire Ins. Co. of W. Va.*[1]

The clause prohibiting gasoline on the insured premises appears as a condition,[2] and, if violated, renders the policy void. If, on breach of the condition, the policy by force of its own language was void, the insured, regardless of loss, might set up the invalidity and recover premiums paid subsequent to breach.[3] The authorities generally hold, however, that a breach of such clause renders the policy voidable rather than void.[4] In case the condition was broken temporarily and a loss subsequent to the termination of such breach occurred, some courts have been prone to let the insurer off, unless the policy had been revived;[5] however, since considerable hardship to the insured resulted from such an interpretation,[6] other courts have held that the policy was temporarily suspended during the breach,[7] and, provided such breach did not contribute proximately to the loss, they have permitted recovery.[8]

In the instant case,[9] since the policy was voidable,[10] the com-

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[1] Bailey v. Mutual Fire Ins. Co. of W. Va., 182 S. E. 288 (W. Va. 1935).

[2] VANCE, INSURANCE (2d ed. 1930) 336, 405.

[3] Langmaid, *Waiver and Estoppel in Insurance Law in California* (1931) 20 CALIF. L. REV. 1.

[4] Professor Williston says, "Where any possible benefit can accrue to the party for whose benefit the provision is made, by keeping the contract in force, there seems no doubt of the propriety of this construction for it cannot have been the intention of the parties that by failing to perform a condition, one who should perform it can free himself from liability." WILLISTON, CONTRACTS (1931) § 746, p. 1420. VANCE, INSURANCE 695. Union Cent. Life Ins. Co. v. Zihlman, 68 W. Va. 272, 69 S. E. 855 (1910).

[5] German Ins. Co. v. Russel, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234 (1902); Morgan v. Germania Fire Ins. Co., 104 Kan. 383, 179 Pac. 330, 3 A. L. R. 794 (1919); Kyte v. Commercial Union Assurance Co., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508 (1889).

[6] This permits insurer to retain the full premium, a part of which is unearned, and also enables him to take advantage of an unsuspected forfeiture through an innocent violation of the condition, though at most it is trivial and wholly unconnected with the fire. Beecher v. Vermont Mut. Fire Ins. Co., 90 Vt. 347, 98 Atl. 917 (1916).

[7] McClure v. Mut. Fire Ins. Co., 242 Pa. 59, 88 Atl. 921 (1913); COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 2933.

[8] Putnam v. Commonwealth Ins. Co., 4 Fed. 753 (1880); Sumter Tobacco Whse. Co. v. Phoenix Ins. Co. Ltd. of London, 76 S. C. 76, 56 S. E. 654 (1907). Some courts have gone farther and, where the broken condition contributed to the loss, permitted recover. See: Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 68 S. W. 977; L. R. A. 1917C 278 (1902); Home Ins. Co. of N. Y. v. Bridges, 172 Ky. 161, 189 S. W. 6 (1916).

[9] *Supra* n. 1.

[10] In order to retain the business of the insured and build up good will in the community, an insurer is often willing to waive a broken condition.

pany could, by waiver unsupported by a consideration,[11] extinguish its power or privilege to set up the breach of condition.[12] Some courts seem to have been zealous, however, in finding evidence of a waiver, either by word or act.[13] It would seem that the question should turn wholly on the authority of the agent who waived the breach; and that the burden of proving the agent's authority as well as the fact of waiver is on the insured.[14] A clause in the policy withholding from agents the power to waive a written condition, although limiting the apparent or ostensible authority of agents, would not prevent a general agent,[15] or a special agent having actual authority,[16] or a subordinate agent whose powers have subsequently been extended by the conduct of the insurer,[17] from binding the insurer by waiving a condition.[18]

West Virginia has held that under such a limiting clause an adjuster without special authority cannot waive a condition in the policy;[19] however, if the adjuster is actually authorized to settle and adjust claims there is apparently no reason why, as incidental thereto, he would not have authority to waive the broken condition.[20] Since there is grave danger of collusion between the insured and an adjuster after a loss, policy would seem to dictate that the result of the West Virginia court in the instant case is

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11 When waivers require consideration. See VANCE, INSURANCE 481.

12 Some courts and writers designate this as an election rather than a waiver; for a criticism of the election theory, see VANCE, INSURANCE 463.

13 Bowman v. Surety Fund Life Ins. Co., 149 Minn. 118, 182 N. W. 991 (1921); New York Life Ins. Co. v. Lahr, 192 Ind. 613, 134 N. E. 657 (1922); Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 78 N. W. 936 (1899). 7 COOLEY, BRIEFS ON INSURANCE 4448. Note (1923) 22 A. L. R. 407.

14 Chambers v. Great State Council, 76 W. Va. 614, 86 S. E. 467 (1915); Kearney v. Aetna Life Ins. Co., 109 Ill. App. 609 (1903); Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 33 (1882).

15 Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732 (1895); 5 COOLEY, BRIEFS ON INSURANCE 4014 *et seq.*

16 The Union Mutual Life Ins. Co. v. McMillen, 24 Ohio St. 67 (1873).

17 Wolfe v. Ohio State Life Ins. Co., 113 W. Va. 884, 170 S. E. 182 (1933); Coles v. Jefferson Ins. Co., *supra* n. 15.

18 Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689 (1877); Bartlett v. Stanchfield, 148 Mass. 394, 395, 19 N. E. 549, 550 (1889). See VANCE, INSURANCE 434.

19 Bond v. National Fire Ins. Co., 77 W. Va. 736, 88 S. E. 389 (1916); Slater v. Williamsburg City Fire Ins. Co., 68 W. Va. 779, 71 S. E. 197 (1910). See also Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101 (1904); 5 COOLEY, BRIEFS ON INSURANCE 4011 *et seq.*

20 Langmaid, *Waiver and Estoppel in Insurance Law — The Agency Problems,* 21 CALIF. L. REV. 91, 108 (1933); Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955 (1896); Dick v. Equitable Fire & Marine Ins. Co., 92 Wis. 46, 65 N. W. 742 (1896); 5 COOLEY, BRIEFS ON INSURANCE 3987.

sound, as the plaintiff apparently failed to establish the authority of the agent to waive the breach of the condition.[21]

The statutory form[22] of the standard fire policy avoids many of the difficulties of the above clause as it omits the word "void" and inserts the following clause:

> "This company shall not be liable for loss or damage occurring . . . . while there is kept, used or allowed on the described premises . . . . gasoline . . ."

The effect of the statutory form is to make the clause an exception rather than a condition, as in the instant case. Should the agent, after loss, attempt to waive this clause, an insured would have to prove not only the agent's authority, but also a valid supporting consideration, because such a waiver in effect would create an entirely new contract.[23]

PRIVATE CORPORATIONS — FORECLOSURE OF CORPORATE TRUST INDENTURE — POWER OF EQUITY COURT TO DISREGARD CONTRACT RIGHTS OF MAJORITY BONDHOLDERS. — Following default in payment of interest and principal by defendant theatre corporation, plaintiffs as trustees for a large bond issue sought foreclosure by a court of equity in accordance with the provisions of the trust indenture.[1] The amended bill prayed for a receivership and for

[21] Plaintiff's witness (defendant's secretary) testified without contradiction that the agent had no authority to bind the defendant in this manner. See *supra* n. 19.

[22] W. VA. REV. CODE (1931) c. 33, art. 4, § 7.

[23] McCoy v. N. W. Mut. Relief Ass'n, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (1896).

[1] In the ordinary case of default in bonded indebtedness, the trustee for the bondholders usually institutes suit to foreclose the mortgage security. Thereafter, certain individuals offer themselves as a Protective Committee for the bondholders, this being arranged often by the debtor's bankers or by the issuing house. The Protective Committee then invites deposit of the bonds, by the bondholders, those depositing passing thereby to the committee legal title and complete authority to act in foreclosure proceedings. There is retained by the depositors simply equitable title, evidenced by the certificate of deposit issued by the committee. Frequently, nearly all bondholders in this fashion turn over their holdings: in any event, a decided majority can normally be obtained without much effort. Eventually, at the subsequent foreclosure sale, a representative of the Protective Committee bids in the property at the upset figure fixed by the equity court. While the old bonds can be applied partially on the purchase price, new money has to be raised by the committee to take care of expenses of the suit, (including fees for the trustee and counsel, and court costs), and to pay off in cash the non-assenting minority bondholders. Of course by assessment proportionately against the de-